NO. 06-18-00212-CR

THE SIXTH COURT OF APPEALS
SIXTH DISTRICT OF TEXAS
AT TEXARKANA

MICHAEL ANHONY HAMMACK

APPELLANT

V.

STATE OF TEXAS,

APPELLEE

On Appeal from the 354th District Court
Hunt County, Texas
Trial Cause Number 32,355CR
Honorable Judge Keli M. Aiken, presiding

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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APPELLANT'S BREIF

TO THE HONORABLE COURT OF APPEALS:

NOW COMES Counsel for Appellant and respectfully submits this brief pursuant to the Texas Rules of Appellate Procedure.

STATEMENT OF THE CASE

This is an appeal of the judgment and sentence in a criminal case in the 354th District Court of Hunt County, Texas on December 5, 2018. After pleading not guilty, Appellant was convicted by a jury of the offense of interfering with child custody. (CR p. 97). Appellant elected to have the jury assess punishment, which they did at 2 years in a state jail facility and a fine of $10,000. (CR p. 107). The jury further recommended that Appellant's jail time be suspended. (CR p. 107). The trial court set Appellant's term of probation at five years, and as a condition of probation, the trial judge ordered that Appellant serve a 180 day up front jail sanction. (CR p. 112). Appellant appeals that conviction.

STATEMENT OF THE FACTS

Appellant was indicted for the state jail felony offense of interfering with child custody on August 17, 2018. (CR p. 5). The indictment alleged Appellant did intentionally or knowingly take or retain Daphney Hammack, a child younger than 18 years of age, when Appellant knew that said taking or retention violated the express terms of a judgment or order of a court disposing of the child's custody, to wit: Order for Protection of a Child in an Emergency, signed by the judge of the 354th District Court of Hunt County, Texas, on or about February 27, 2018. (CR p. 5).

On December 3, 2018, just prior to jury selection, a discussion was held on the record which referred to an off the record conversation held between the trial court, prosecutor, and defense attorney. (RR 5, p. 5). The record makes it clear that the attorneys and the trial judge had a discussion regarding mistake of law and mistake of fact. Appellant's trial attorney concedes that he is not entitled to raise a defense of mistake of law but argues that Appellant might be entitled to a mistake of fact instruction. (RR 5, p. 5-6). The trial court allowed Appellant's trial counsel to introduce the law on mistake of fact during voir dire but prohibited him from talking about any facts regarding the issue. (RR 5, p. 9).

Testimony began on December 4, 2018. (RR 6). The State's first witness was Michael McAda, a detective with the Commerce Police Department. (RR 6, p. 17-18).

McAda became involved in the case involving Appellant on March 8, 2018, when he learned that Daphney Hammack had escaped from CPS custody and was taken to Oklahoma where she married her boyfriend. (RR 6, p. 20). The State, with no objection from Appellant, admitted State's Exhibit 1, an agreed stipulation of evidence that stated, "As of 27 February 2018, the Department of Family and Protective Services was by Court Order granted sole managing conservatorship of the Defendant's minor child, Daphney Hammack. This Order gave the Department of Family and Protective Services the sole right of possession and physical custody of the minor child as well as the right to consent to marriage. As of the date of the Courts' Order for Protection, the defendant Michael A. Hammack, did not have a legal right to possess, take, or retain his minor child. He by Court Order also did not have the right to consent to the marriage of his daughter." (RR 8, p. 3). The State also, with no objection and without laying a proper foundation, admitted State's Exhibit 2, the Order for Protection of a Child in an Emergency and Notice of Hearing. (RR 6, p. 24; RR 8, p. 4).

When the State attempted to offer State's exhibit 3, the Writ of Attachment with attached Order, Appellant's trial attorney objected. (RR 6, p. 27-29). After much discussion, an agreement was made to redact portions of the order attached to the writ and stipulate that the writ was valid. (RR 6, p. 30-32).

Detective McAda testified that Daphney Hammack was the 16 year old daughter of Appellant. (RR 6, p. 34). Detective McAda testified that, in the course of his

investigation, he learned that Appellant had taken his 16 year old daughter to Oklahoma and signed the necessary documents so that she could be married. (RR 6 p. 35).

On cross-examination, Detective McAda said that he did not find any documentation that would show that Appellant had ever been served with the court orders that are the subject of his criminal trial. (RR 6, p. 36-37). Detective McAda offered no evidence of any efforts made to have Appellant served with the documentation and gave no testimony as to any knowledge Appellant had of the court orders.

The State next called Officer Kelvin Rhodes with the Commerce Police Department. (RR 6, p. 38). Officer Rhodes became involved in the case when CPS requested assistance in locating the run-away juvenile. (RR 6, p. 39). Officer Rhodes testified that he went to the home of Appellant on February 27, 2018 and made contact with Appellant. (RR 6, p. 41). Officer Rhodes testified that, based on his conversation with Appellant o the evening of February 27, 2018, he believed Appellant knew that Daphney had been picked up by CPS. (RR 6, p. 42). Officer Rhodes testified that Appellant allowed him into Appellant's home and allowed him to search for Daphney. (RR 6, p. 42). Daphney was not located in Appellant's home. (RR 6, p. 42).

On cross examination, Officer Rhodes stated that he did not see any evidence that Appellant had ever been served with the court orders in this case. (RR 6, p. 48). Officer Rhodes did, however, testify that he believed Appellant had knowledge of the

fact that CPS had custody of Daphney as of the time Officer Rhoades arrived at Appellant's house. (RR 6, p. 51). However, Officer Rhoades gave no evidence, other than his opinion, to prove that Appellant had actual knowledge of any court orders. Further, Officer Rhoades gave no testimony as to whether or not Appellant had ever seen the orders or whether or not Appellant knew the express terms of the order.

The State next called Marcus Cantera, an officer with the Commerce Police Department. (RR 6, p. 53). Sgt. Cantera was called to assist CPS with their search for Daphney Hammack. (RR 6, p. 55). On February 27, 2018, Sgt. Cantera went to Daphney's grandmother's house at 808 Plum Street in Commerce and made contact with Dapheny's grandmother. (RR6, p. 54- 55). As Sgt. Cantera was searching the home for Daphney, he heard voices coming from the attic and saw Appellant who was half-in and half-out of the attic. (RR 6, p. 58). Sgt Cantera testified that Appellant became argumentative with him, stating that Sgt. Cantera had no right to be in the home. (RR 6, p. 59). Sgt. Cantera testified that it was his opinion, based on his interactions with Appellant, that Appellant knew CPS had custody of his daughter. (RR 6, p. 61). Like the other witnesses who testified, Sgt .Cantera had nothing, other than his opinion, to prove that Appellant had knowledge that an order even existed. Sgt. Cantera certainly gave no evidence at all to show that Appellant was aware of the express terms of any court orders that existed.

The State next called Amber Davidson, an investigator with the Texas Department of Family and Protective Services during the events relevant to this case. (RR 6, p. 67-68). Ms. Davidson testified that Daphney Hammack was Appellant's 16 year old daughter. (RR 6, p. 69). Ms. Davidson began investigating a case regarding concerns expressed by Dapheny's school counselor on February 23, 2018. (RR 6, p. 71). Ms. Davidson made contact with Appellant and told him CPS had received a report regarding his family. (RR 6, p. 72). Ms. Davidson testified that Appellant was uncooperative with her and that she informed Appellant if he did not cooperate that she would obtain court orders. (RR 6, p. 73). Ms. Davidson stated that CPS did obtain a Order for Protection and a Writ of Attachment regarding Daphney Hammack, and those orders were admitted into evidence. (RR 6, p. 74). On February 27, 2018, after obtaining the writ of attachment, Ms. Hammack went to Commerce High School and took custody of Daphney Hammack and took her back to the CPS office. (RR 6, p. 81). Once back at the office, Ms. Davidson testified that she called Appellant and informed him that she had an order granting CPS custody of Daphney and that she had Daphney in her custody. (RR 6, p. 81). Ms. Davidson said Appellant's response was "that can't be possible." (RR 6, p. 82). Ms. Davidson did state that there was no doubt in her mind that Appellant knew CPS had a court order for custody of Daphney at the end of her telephone conversation with Appellant. (RR 6, p. 85).

Ms. Davidson testified that she and other CPS employees and police officers searched from Dapheny from February 27, 2018 through March 6, 2018. (RR 6, 9. 89). On March 6, 2018, Daphney was located at Appellant's home. (RR 6, p. 90). Ms. Davidson testified that Daphney reported to her that Appellant and her grandmother had transported her to Oklahoma so she could get married. (RR 6, p. 90).

Ms. Davidson conceded that the Department never had Appellant served with the order in this case. (RR 6, p. 94-95). Ms. Davidson also conceded that, if a person had not physically read a court order, unless that order had been explained to them in detail, a person could not possibly know what was contained in said order. (RR 6, p. 94). Ms. Davidson testified that she never explained what was in the court order to Appellant. (RR 6, p. 97).

The State next called Laura Sumner, a court clerk for Choctaw County, Oklahoma. (RR 6, p. 104). Ms. Sumner testified that Appellant brought his daughter to her office so that he could consent to her being married while she was underage. (RR 6, p. 104-105). Ms. Sumner testified that Appellant's daughter did in fact get married at her court that day. (RR 6, p. 109).

Rhonda West, CPS investigator, testified that she was present when Amber Davidson when she went to Appellant's residence on February 27, 2018. (RR 6, p. 137). Ms. West testified that, when she and Ms. Davidson encountered Appellant at his residence on February 27, 2018, he immediately told them to get off his property.

(RR 6, p. 138). Ms. West testified that there was no doubt in her mind that Appellant knew court orders had been issued regarding Appellant's daughter, Daphney, but she gave no evidence, other than her opinion, as to why she believed that. (RR 6, p. 139). Ms. West further testified that Appellant was not served with a copy of the order and that the contents of the order were not explained to Appellant. (RR 6, p. 141-142).

Point of Error No. One

The evidence is insufficient to prove that Appellant knew he was violating the express terms of a judgement or order.

The Law

Legal Sufficiency

Challenges to the sufficiency of the evidence are reviewed under the standard enunciated in *Jackson v. Virginia,* 443 U.S. 307, 318–20, 99 S.Ct. 2781, 2788–89, 61 L.Ed.2d 560 (1979). *Brooks v. State,* 323 S.W.3d 893, 894–913 (Tex.Crim.App.2010). Under the *Jackson* standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson,* 443 U.S. at 317–19, 99 S.Ct. at 2788–89; *Laster v. State,* 275 S.W.3d 512, 517 (Tex.Crim.App.2009). Evidence is insufficient under four circumstances: (1) the record contains no evidence probative of

an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; or (4) the acts alleged do not constitute the criminal offense charged. *See Jackson,* 443 U.S. at 314, 318 & n. 11, 320, 99 S.Ct. at 2786, 2788–89 & n. 11; *Laster,* 275 S.W.3d at 518; *Williams v. State,* 235 S.W.3d 742, 750 (Tex.Crim.App.2007). Courts consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from that evidence in making a determination. *Clayton v. State,* 235 S.W.3d 772, 778 (Tex.Crim.App.2007).

The *Jackson* standard defers to the factfinder to resolve any conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from "basic facts to ultimate facts." *Jackson,* 443 U.S. at 318–19, 99 S.Ct. at 2788–89; *Clayton,* 235 S.W.3d at 778. An appellate court presumes the factfinder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson,* 443 U.S. at 326, 99 S.Ct. at 2793. If an appellate court finds the evidence insufficient under this standard—meaning that no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt—it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida,* 457 U.S. 31, 41, 102 S.Ct. 2211, 2218, 72 L.Ed.2d 652 (1982); *Jackson,* 443 U.S. at 317–19, 99 S.Ct. at 2788–89.

This Court noted in *Delay* that "...[S]ometimes appellate review of legal

sufficiency involves simply construing the reach of the applicable penal provision in order to decide whether the evidence, even when viewed in the light most favorable to conviction, actually establishes a violation of the law." *Delay v. State*, 465 S.W.3d 232, 235 (Tex. Crim. App. 2014).

"It is within the . . . duty of [a court of appeals] to reverse any judgment appeal when the record affirmatively discloses that such judgment is based upon findings of fact that are so palpably contrary to the overwhelming weight and preponderance of the credible evidence as to be clearly wrong." *Insurance Co. of North America v. Cangelosi*, 217 S.W.2d 888, 889 (Tex. App. Waco 1949, *no writ*). Courts of appeal obtain their jurisdiction from Texas Constitution Article V, § 6, which gives the courts of appeal jurisdiction over criminal cases and keep intact the responsibility of the courts of appeals to decide "questions of fact" in their review of criminal cases. Tex. Const. Art. V, § 6.

When conducting a legal sufficiency review, reviewing courts are to review all the evidence (facts), and not just the evidence that favors the conviction, (2) in the light most favorable to the prosecution, and (3) affirm the conviction if the evidence (facts) is legally sufficient for a *rational* trier of fact to find all the elements beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (emphasis supplied). When an appellate court carefully considers all the facts and concludes that the evidence rationally establishes nothing more than a mere suspicion of wrongdoing

by the defendants, a judgment of acquittal must be entered. *Winfrey v. State*, 323 S.W.3d 875, 879 (Tex. Crim. App. 2010)

In applying this standard to circumstantial evidence cases, however, we consider whether the circumstances exclude every other reasonable hypothesis except that of the guilt of the accused. *Butler*, 769 S.W.2d at 238 n. 1; *Humason v. State*, 728 S.W.2d 363, 366 (Tex.Crim.App.1987); *Carlsen v. State*, 654 S.W.2d 444, 449 (Tex.Crim.App.1983) (opinion on rehearing). If the evidence supports a reasonable inference other than finding the essential elements of the crime, then no trier of fact could rationally find the accused guilty beyond a reasonable doubt. *Carlsen*, 654 S.W.2d at 449–50; F*reeman v. State*, 654 S.W.2d 450, 456–57 (Tex.Crim.App.1983) (opinion on rehearing); *Denby v. State*, 654 S.W.2d 457, 464 (Tex.Crim.App.1983) (opinion on rehearing). Proof which amounts to only a strong suspicion or mere probability of guilt is insufficient to support a conviction. *Humason*, 728 S.W.2d at 366; *Moore v. State*, 640 S.W.2d 300, 302 (Tex.Crim.App.1982).

It is the job of an appellate court to determine whether any rational trier of fact could have, based on the evidence admitted at trial, found the essential elements of the offense beyond a reasonable doubt. *Fernandez v. State*, 805 S.W.2d 451, 453 (Tex. Crim. App. 1991).

Notice

A person commits an offense if he takes or retains a child younger than eighteen years when he knows that his taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody. *See* TEX. PEN.CODE ANN. § 25.03(a)(1) (Vernon 1994). To prove an offense, the person must have notice of the order. *Cf. Ramos v. State,* 923 S.W.2d 196, 198 (Tex.App.-Austin 1996, no pet.); *Small v. State,* 809 S.W.2d 253, 256 (Tex.App.- San Antonio 1991, pet. ref'd). At a minimum, the person must be "somehow aware of what he is prohibited from doing by a specific court order.... " *Cf. Small,* 809 S.W.2d at 256.

In *Small v. State*, the Court in San Antonio considered a similar issue. In *Small*, the defendant was convicted of violating a protective order with which, like the case at bar, the defendant had never been served. Reversing that conviction, the court held, "Unless a defendant is somehow aware of what he is prohibited from doing by a specific court order, he cannot be guilty of knowingly and intentionally violating that court order. We hold that this is an essential element of this offense, and the State is required to prove that the appellant "knowingly and intentionally" violated the court order in question beyond a reasonable doubt." *Id.* at 256.

Argument

As alleged in the indictment and outlined in the Court's charge to the jury, a person commits an offense if the person takes or retains a child younger than 18 years of age when the person knows that such taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody. In this case, the State wholly failed to prove that Appellant ***knew*** he was violating the ***express terms*** of a judgment or court order. In fact, the evidence presented by the State was undisputed that Appellant had never been served with a copy of the court order, never been provided a copy of the court order, and had never been told what was contained in the court order. While several of the State's witnesses said it was there opinion that Appellant knew an order existed, there is not a single piece of evidence to prove that Appellant had ever seen the court order or knew what the contents of the order were. In fact, the testimony from the State's witnesses seems to prove the fact that Appellant ***did not*** have knowledge of the order.

According to Officer Marcus Cantera, when he entered Appellant's mother's home on February 27, 2018, Appellant told Officer Cantera that the officer had no right to be there. Clearly, Appellant was not aware of the existence of a court order that gave officials the right to search for and take custody of Dapheny, based on his comments to Officer Cantera.

The testimony of the State's star witness, Amber Davidson provides further proof that Appellant did not have knowledge of the court order. Ms. Davidson was the

only witness who testified that she told Appellant an order existed. No other witness ever told Appellant that a court order existed. While Ms. Davidson did testify she told Appellant she had an order granting her custody of Daphney, Ms. Davidson further testified that Appellant did not believe her. According to Ms. Davidson's own testimony, Appellant's response to her informing Appellant that she had a court order was, "That can't be possible." Appellant was never told more about the order by Ms. Davidson, or anyone else. It is inconceivable that Appellant is presumed to know, beyond a reasonable doubt, that 1. an order existed and, 2. what the express terms of the order were, when the solitary informed he received, from a CPS employee that he didn't trust, was that a custody order existed. Appellant cannot be found guilty of knowingly violating the express terms of an order when he was never made aware of what the express terms of the order were. And the State's own witness testified that Appellant did not know what the express terms of the order were.

At trial, the State alleged that Appellant actively tried to avoid service. This allegation was entirely unsupported by the record as there was no evidence presented of any efforts the Department made to try to have Appellant served. The Department did not send a process server out to attempt to serve Appellant. The Department did not send a constable out to attempt to serve Appellant. The Department did not mail the order to Appellant at his residence. The Department did not even, as often happens with process servers, leave a copy on the ground in front of Appellant's door so that he

could read the order. In short, the Department did nothing to attempt to have Appellant served. At trial, witnesses for the State said they didn't attempt to serve Appellant because they did not think their efforts would be successful. To be quite blunt, that's just not good enough. A CPS worker's opinion as to whether or not attempted service would be successful is not an excuse for the State to wholly fail to follow the rules of civil procedure, and then to hold Appellant criminally liable for violating an order when he has no idea what is contained in the order. It is inexcusable for the State to allege that Appellant attempted to avoid service when the State made zero efforts to have Appellant served.

The record is clear and uncontroverted that Appellant was never served with the order at issue in this case. The record is further clear and uncontroverted that Appellant was never given a copy of the order. The record is clear and uncontroverted that Appellant was never told the contents of the order. The only evidence in this case that Appellant had any knowledge that an order might exist is one CPS worker says she told him an order existed. But, on cross-examination, that witness admitted that she did not tell Appellant any of the details of the order. There is absolutely no evidence in the record that Appellant knew any of the "express terms" of the order that he is charged with violating. As the San Antoino court held in *Small v. State*, Appellant could not violate an order he knew nothing about. Appellant's knowledge is a necessary

element of the offense, and the State's failure to establish this element results in the conviction being unsupported.

Although the law is clear that a defendant is presumed to know statutory law, the State cannot convincingly argue that a defendant is presumed to know what every court order ever issued prohibits. The State did not satisfy its obligation, as alleged, by simply establishing that other persons surrounding the investigation had the opinion that Appellant knew a court order existed. In order to uphold their conviction, the State would have to prove that Appellant knowingly and intentionally violated the express terms of that order. This, the State wholly failed to do.

The State contends that, because a CPS investigator, whom the testimony clearly shows Appellant did not trust, testified she told Appellant she had a court order, and because a police officer believed Appellant knew there was an order, that Appellant is then presumed to have knowledge of the contents of the court order. To conclude so would amount to nothing more than speculation and surmise. The jury is "not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper*, 214 S.W.3d at 15. And, although "[a] conclusion reached by speculation may not be completely unreasonable, ... it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.* at 16. As in similar cases that have come before this very court, this court should therefore, conclude that the evidence is insufficient to support Appellant's conviction. *See Mondy*

v. State, 06-16-00100-CR, 2017 WL 359786, at *3 (Tex. App.—Texarkana Jan. 24, 2017, pet. ref'd).

The evidence in this case does not even prove beyond a reasonable doubt that Appellant knew an order even existed. But, for the sake of argument, even if this court finds that the testimony presented by the State proves beyond a reasonable doubt that Appellant knew an order existed, the evidence is still insufficient to find Appellant guilty of the charge as indicted because the record is completely and totally void of any evidence that Appellant knew what the express terms of the order were. And, as stated in *Small v. State*, unless Appellant is somehow aware of what he is prohibited from doing by a specific court order, he cannot be guilty of knowingly and intentionally violating that court order.

For the reasons stated above, Appellant asks this honorable court to reverse this conviction and render a judgement of acquittal.

PRAYER FOR RELIEF

For the reasons stated hereinabove, it is respectfully submitted that, upon appellate review, the Court of Appeals should reverse the judgment of conviction and sentence of the Trial Court.

Respectfully submitted,

/s/ Jessica McDonald

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellant's Brief was served on the Hunt County District Attorney's Office through the efiletexas website on April 10, 2019.

/s/ Jessica McDonald
JESSICA MCDONALD

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellant's Brief was delivered to Appellant via certified mail.

/s/ Jessica McDonald
JESSICA MCDONALD

CERTIFICATE OF COMPLIANCE

I certify that Appellant's Brief is written in Times New Roman font in 14 point text. Appellant's brief has 4847 works according to the word count feature on the undersigned attorneys word processing program.

/s/ Jessica McDonald
JESSICA MCDOALD